
CANADA / JUDGMENT

Scrumpy Consulting Inc. v. Brennan

2013 BCSC 563

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 563 Scrumpy Consulting Inc. v. Brennan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Scrumpy Consulting Inc. v. Brennan,

2013 BCSC 563

Date: 20130328

Docket: 11-3683

Registry: Victoria

In the Matter of the Judicial Review Procedure Act

Between:

Scrumpy Consulting Inc.

Petitioner

And:

Mark Brennan, Approving Officer

Respondent

Before: The Honourable G.R.J. Gaul

Reasons for Judgment

Counsel for the Petitioner:

L.J. Alexander

Counsel for the Respondent:

S.L. Beach

Place and Date of Hearing:

Victoria, B.C.

May 10, 11 and June 27, 2012

Place and Date of Judgment:

Victoria, B.C.

March 28, 2013

Introduction

- [1] The petitioner, Scrumpy Consulting Inc. ("Scrumpy") is the registered owner of a residential property located at 754 Mountjoy Avenue in the District of Oak Bay (the "Mountjoy Property"). The respondent, Mark Brennan, is the approving officer for the District of Oak Bay (the "Approving Officer").
- [2] Pursuant to the Bare Land Strata Regulations, B.C. Reg. 75/78 (the "Regulations") of the Strata Property Act, S.B.C. 1998, c. 43, Scrumpy wishes to subdivide the Mountjoy Property, but the Approving Officer has refused to approve the development (the "Decision").
- [3] By way of petition to this court, Scrumpy seeks a review of the Approving Officer's decision, and in particular it seeks the following:
- a) an order quashing the Approving Officer's refusal to approve Scrumpy's application for a 3-lot bare land strata subdivision of the Mountjoy Property;
 - b) an order in the nature of mandamus directing the Approving Officer to approve the proposed subdivision of the Mountjoy Property;
 - c) in the alternative, an order directing the Approving Officer to reconsider the proposed subdivision of the Mountjoy Property in accordance with the directions of the court;
 - d) an order that the Approving Officer produce the record upon which he based his rejection of the proposed subdivision of the Mountjoy Property; and
 - e) costs.

Issues

- [4] The following issues must be resolved on this judicial review:
- a) Did the Approving Officer exceed his jurisdiction in denying the Second Application?
 - b) Did the Approving Officer act in a discriminatory fashion or base his decision on improper or irrelevant factors?

- c) Was the decision making process adopted by the Approving Officer unfair to Scrumpy and in violation of the principals of natural justice?

Standard of Review

- [5] As there is no statutory appeal from the Approving Officer's decision provided for in the Regulations, Scrumpy has brought this petition seeking a review of the Approving Officer's decision under the Judicial Review Procedure Act, R.S.B.C. 1996, 241.
- [6] The parties agree that the Approving Officer's decision should be reviewed on a standard of reasonableness and that the reviewing court should give the decision considerable deference. This approach was adopted in *Norgard v. Carley*, 2008 BCSC 1236, where Hinkson J. (as he then was) quoted the headnote of *Vancouver v. Simpson*, [1977] 1 S.C.R. 71 at 72:

Where, as held by the trial judge, there is a direct statutory foundation for the ground given for the decision to approve or disapprove an application for subdivision, and where it is not shown that that decision, despite its impact on an individual, was made in bad faith, or with the intention of discriminating against that individual, or on a specious or totally inadequate factual basis, there should be no interference by the Court with municipal officials honestly endeavoring to comply with the duties imposed on them by the Legislature in planning the coherent and logical development of their areas.

- [7] In *Hlynsky v. District of West Vancouver* (1989), 37 B.C.L.R. (2d) 79 (C.A.), Craig J.A. applied the principles articulated in *Simpson* and explained the analytical framework for reviews of an approving officer's decision at pp. 84-85:

The chambers judge approached this case on the basis that in reviewing the reasons underlying the approving officer's refusal to approve the subdivision plans "the court is engaged in a careful, critical analysis of the substantive reasons underlying the refusal". I disagree with this approach...In reviewing the refusal of an approving officer for a proposed subdivision, a court should not subject his reasons to "a careful, critical analysis". This suggests to me that criticism may be captious in the sense that it is disposed to be fault-finding. The reviewing court should allow the approving officer substantial latitude and should not be quick to find fault with his decision. The only concern of the reviewing court is whether the approving officer based his decision (1) in bad faith, (2) with intent to discriminate against any property owner, and (3) made his refusal on "specious and totally inadequate factual basis".

- [8] The "critical analysis" to be avoided is one relating to the approving officer's reasons for reaching a decision. On the other hand, a careful assessment of the evidence the approving officer relies upon to base his or her decision is quite proper, as such a review could disclose a completely inadequate factual foundation for the decision or bad faith on the part of the approving officer: *Moore v. Saanich (District)* (1995), 13 B.C.L.R. (3d) 20 (S.C.).

Facts

- [9] The Mountjoy Property is a 4,307 square metres residential property in the District of Oak Bay (the "District"). Under the District's Zoning Bylaw 3531 the Mountjoy Property is zoned as "RS-4 - One-Family Residential Use". Bylaw 3531 establishes minimum sizes and dimensions for properties zoned RS-4.
- [10] In October 2010, Scrumpy applied to the District for approval of a development plan that created three bare land strata lots on the Mountjoy Property (the "First Application"). The District's Deputy Approving Officer (not Mr. Brennan), considered the First Application and provided Scrumpy with a preliminary layout approval. In his letter to Scrumpy dated 25 October 2010, the Deputy Approving Officer explained:

Your application for preliminary review of the proposed bare land strata subdivision of the above property has been considered and this letter summarized the additional material which must be provided and the deficiencies which must be corrected before approval of the subdivision plan will be considered. Although I have sought to list all outstanding items, this letter does not constitute an approval and any matters which I have overlooked or matters which arise after the date of this letter may result in the proposed subdivision being refused.

...

Oak Bay being a fully developed community, virtually all subdivision is in the nature of infill development, occurring within long established neighbourhoods. The proposed subdivision of 754 Mountjoy Ave. falls into this category. In this context, my assessment is that consideration of both the public interest and the impact on the amenities of neighbouring properties argues in favour of a design approval process for the development of the three lots.

- [11] Two of the three proposed bare land strata lots had features that were non-compliant with the property's RS-4 zoning. The District's Deputy Approving Officer concluded:

Absent rezoning or a variance by way of a development variance permit, this non-compliance by itself is a bar to approval of the proposed layout.

- [12] After considering its options, Scrumpy chose to proceed with a request to the District's council for a development variance permit. On 6 December 2010, Scrumpy's request was considered by the District's Committee of the Whole - Land Use Section. The Approving Officer and the District's Deputy Approving Officer were present at the meeting, as was Mr. Ian Waller, Scrumpy's President and Director. The minutes of the committee's meeting indicate:

While concerns were raised regarding the potential impact of the proposed three lot bare land strata subdivision on the character of the area, it was the majority view that proceeding to the notification stage of the development permit process in order to receive input from residents in the vicinity was supportable.

MOVED by Councillor Jensen

Seconded by Councillor Herbert, That a resolution authorizing the issuance of development variance permit with respect to 754 Mountjoy Avenue, as outlined in correspondence item number 2010-313, be brought forward for formal consideration.

- [13] In the result, Scrumpy's application for a development variance permit for the First Application was scheduled for consideration at the District's council meeting on 10 January 2011.
- [14] In the days leading up to the 10 January 2011 council meeting, the District received a number of letters from local residents opposed to the First Application. Scrumpy's request for development variance permit was considered and debated at the District's council meeting on 10 January 2011. Oak Bay residents opposed to the redevelopment expressed their views and letters opposing the project were also read into the record. Those opposed to the subdivision expressed concerns about:
- a) the increase in density and vehicular traffic that would result from the proposal;
 - b) the impact the proposal would have on the natural beauty and special character of the street and neighbourhood, as well as the impact it would have on the trees and wildlife in the area;
 - c) the precedent the proposal would create for the subdivision of other properties in the neighbourhood; and
 - d) how the proposed redevelopment would not be in keeping with the general character of the neighbourhood.
- [15] Mr. Waller was present at the meeting and spoke in favour of Scrumpy's application. He also read into the record a number of letters from residents who supported the proposed redevelopment of the Mountjoy Property. In attempting to address all of the concerns expressed during the meeting, Mr. Waller explained that the project was the first of its kind for him and that he would work with District officials to ensure the redevelopment of the property fit with the overall ambience of the neighborhood.
- [16] At the conclusion of the debate, the District's council was unanimous in its decision to deny Scrumpy's application for a development variance permit. The minutes of the council meeting indicate:

Following further discussion with members of Council commenting on various aspects of the plans and various questions from Council being answered by staff and the applicant, it emerged that it was the majority view that the development variance permit application could not be supported as submitted inasmuch as the resulting development would not be in keeping with the surrounding area.

- [17] As a result of the rejection of its application, Scrumpy redesigned its subdivision plan for the Mountjoy Property so that it was in compliance with Bylaw 3531 and the RS-4 zoning requirements. This eliminated the need for a development variance permit.
- [18] On 20 January 2011 Scrumpy submitted a new application encompassing a modified development plan that still entailed subdividing the Mountjoy Property into three bare land strata lots and a common property access road to the District for its approval (the "Second Application").
- [19] The Second Application was referred to the Approving Officer for his consideration and determination. The Approving Officer reviewed the material collected and on file relating to the First Application, including the work done by the Deputy Approving Officer, staff reports, the minutes of District council and committee meetings, and the information supplied by Scrumpy.
- [20] In assessing whether the Second Application was against the public interest, the Approving Officer decided to canvass the views of the residents of the properties in the area of the Mountjoy Property. The letter dated 14 March 2011 that was sent to these homeowners included the following:

As Approving Officer for the District of Oak Bay I am in receipt of a draft layout for a proposed subdivision of the property at 754 Mountjoy Avenue. Upon review it would appear that the proposed layout would meet the requirement of Oak Bay's Zoning Bylaw. That does not mean, however, that the applicant is necessarily entitled to approval of his application. As Approving Officer it is my duty to consider other factors. In particular I must consider whether approval of this application would be "against the public interest".

One method of determining the "public interest" is to solicit the views of those who may be affected by the subdivision. Therefore, I am requesting that you provide me with your views in the form of a written submission. I would encourage you to comment whether you are in favour of the subdivision or not. There is, in fact, no statutory definition of the term "public interest" and I will therefore not attempt to limit the scope of our comments.

I would request that your submissions be in the form of a letter and include your residential address. Please be assured that your address will be used for internal purposes only. ...

- [21] In a letter dated 4 May 2011, the Approving Officer informed Scrumpy that the Second Application had been denied. In his letter, the Approving Officer explained the reasons for denying Scrumpy's application as follows:

... I have determined that your proposal is against the public interest and therefore your application is denied.

The area surrounding the subject property is characterized by well-established homes situated in a heavily wooded setting. With a couple of exceptions, the west side of Runnymede Avenue/ Mountjoy Avenue consists of "estate" style homes, i.e. residences situated on relatively large lots. It is true that there has been at least one subdivision in the past that has created smaller lots in that area, but it would be in the public interest to ensure that any further subdivisions do not adversely affect the nature of the neighborhood.

Indeed there have been concerns expressed about recent developments, particularly those in adjacent properties in the City of Victoria. Those concerns were evidence when you recently applied to Council for a Development Variance Permit regarding a previous subdivision proposal for the subject property. Being mindful of these concerns, I canvassed the neighbourhood (Runnymede Avenue, Runnymede Place, Mountjoy Avenue) and received a fairly robust response. The responses were overwhelmingly negative. The overall opinion is that the 3-lot subdivision you are proposing would be detrimental to the ambiance of the neighbourhood. There were also concerns expressed as to the number of trees, particularly Garry Oaks, that would have to be removed, which would further detract from the nature of the neighbourhood.

Although approval of subdivisions falls under the authority of the Approving Officer, I may, in my discretion, consider the views of Council when gauging the matters concerning the public interest. As previously noted, Council has expressed its disapproval of a 3-lot subdivision for the subject property. However, they did also express the opinion that they would not be averse to a 2-lot subdivision. In fact, many of the neighbours have also indicated that a 2-lot subdivision would not be unreasonable.

On the basis of the foregoing, you may wish to consider a revised subdivision proposal involving only two lots. Approval of such proposal would still be heavily dependent on whether it is in the public interest. Any such proposal would have to be sensitive to the nature of the neighbourhood and must involve a high degree of tree retention.

[22] In May and June 2011, Scrumpy attempted to engage the Approving Officer in further dialogue regarding the proposed subdivision of the Mountjoy Property. In particular, Scrumpy requested the letters or emails that the District had received about the proposed subdivision, and if, for confidentiality reasons the actual correspondence could not be provided, then to provide a summary of the information and concerns contained in those materials.

[23] The Approving Officer's response to Scrumpy's request is contained in his letter dated 23 June 2011 that includes the following:

...

My decision was not made lightly - I took the time to carefully consider many factors. Therefore, once I made my decision it was final. There is no room for reconsideration, and therefore it is not necessary for you to attempt to address any concerns.

[24] Counsel retained by Scrumpy wrote to the Approving Officer on 29 June 2011 and requested that he produce "the entire 'record'" upon which the refusal of the Second Application was based.

[25] The Approving Officer replied to Scrumpy's counsel on 30 June 2011. In his response, the Approving Officer noted:

I write in response to your letter dated June 29, 2011 in which you requested a copy of the "record" upon which I based my decision to refuse your client's subdivision application.

As I explained to your client earlier, the communications that I had with neighbours did not form the sole basis upon which I made my decision. My decision was also based on the following considerations (not exhaustive):

1. Comments made by Council and submissions made by members of the public in the context of a development variance permit application associated with a previous subdivision proposal for the subject property.
2. Submissions made by member of the public in the context of a subdivision / heritage revitalization agreement proposal for a property in close proximity to the subject property.
3. Verbal comments made generally about the nature and character of the subject neighbourhood.
4. My own on-site observations of the nature and character of the subject neighbourhood.

I did not have specific communications with Council members about your client's subdivision.

Furthermore, as I have advised your client, my decision on this matter is final - I am not willing to review it.

Discussion

Did the Approving Officer exceed his jurisdiction?

[26] Section 3(1) of the Regulations governs the Approving Officer's jurisdiction to assess and decide the Second Application. The relevant portions of section 3(1) read:

Requirements for approval

3 (1) In considering an application for the approval of a bare land strata plan, the approving officer may

...

- (e) refuse to approve the bare land strata plan, if he considers that
- (i) the anticipated development would injuriously affect the established amenities of adjoining or reasonably adjoining properties,
- (ii) the deposit of the bare land strata plan is against the public interest

- [27] Scrumpy points to the fact that the First Application which entailed a three-lot subdivision was granted a preliminary layout approval by the District. While there was a need to address some deficiencies in the proposal, the fact remained that the concept of a three-lot subdivision was not rejected outright. Scrumpy argues that a comparison of the two applications reveals no substantial differences except the Second Application has been modified slightly to avoid the need for a development variance permit or a rezoning of the entire property.
- [28] I am not persuaded that the fact that Scrumpy obtained a preliminary layout approval for the First Application meant that a 3-lot subdivision of the Mountjoy Property was in the public interest. The District's Bylaw 3578 sets out the framework for the regulation of subdivision and development of land in the District. With regard to the role of preliminary layout approvals like the one Scrumpy obtained for the First Application, Bylaw 3578 provides:

...

Preliminary Layout Consideration

16. An applicant may, before submitting a plan of subdivision for approval under the Land Title Act or the Condominium Act, make an application for preliminary layout consideration.
- ...
21. Preliminary layout consideration shall not be construed as approval of the proposed subdivision for land registration or any other purpose.
22. Preliminary layout consideration shall not be construed as acceptance by the Approving Officer of anything other than the general layout of the proposed subdivision, and a list of minimum conditions which would be required to be satisfied prior to approval.
- [29] The law is clear that the granting of a preliminary layout approval for a proposed subdivision vests no legal rights in the property owner: *Thomas v. British Columbia (Provincial Approving Officer)* (1996), 35 M.P.L.R. (2d) 238 (BCSC), *aff'd* (1997) 43 B.C.L.R. (3d) 34 (C.A.). In my view, the fact that a preliminary layout approval was granted with respect to the First Application has little to no bearing on the Approving Officer's consideration and decision of the Second Application.
- [30] In assessing an application for a subdivision, the Approving Officer has a duty to consider the public interest. In my opinion, that is what the Approving Officer did with respect to the Second Application. In the process of determining whether the proposed subdivision was against the public interest, the Approving Officer properly sought and received the opinions of those who would or could be affected by the project. The majority of the responses he received were opposed to the proposal. The Approving Officer conducted several on-site inspections of the Mountjoy Property and the surrounding area and he considered the views of the District council. I see nothing in what the Approving Officer did that would lead to the

conclusion that he exceeded his jurisdiction when he considered and then rejected the Second Application.

Did the Approving Officer act in a discriminatory manner or consider improper information in reaching his decision?

- [31] Scrumpy argues that the Approving Officer acted in a discriminatory fashion by seeking the opinions of the residents of the properties adjacent to or near the Mountjoy Property. Scrumpy also alleges that the Approving officer had a totally inadequate factual basis upon which to base his conclusion that the proposed subdivision would have a detrimental impact on the neighbourhood.
- [32] In *Dubuc v. Saanich (District)* (1994), 22 M.P.L.R. (2d) 47 (BCSC), Baker J. explained the concept of discrimination in the context of a challenge to an approving officer's decision as follows:
- [34] discrimination involves two elements: factual discrimination, or different treatment of similarly situated persons, and the improper motive of favouring or hurting an individual without regard to the public interest
- [35] Intent to discriminate must be proved, but it may be established objectively. If an applicant for subdivision is treated in a way that is clearly less favourable than another homeowner in identical or substantially similar circumstances, and there are no relevant distinguishing factors to account for the differential treatment, the court may infer the intention to discriminate on the part of the approving officer. The onus is on the applicant, however, to show that there is such similarity in the circumstances of the properties sought to be compared and such lack of distinguishing features, that the court is compelled to conclude that the approving officer intended to discriminate.
- [33] There is no evidence before this Court that suggests the Approving Officer treated Scrumpy any differently than any other applicant for a subdivision nor is there any evidence that the Approving officer has shown favour or disfavour towards anyone involved in the processing of the Second Application. An approving officer is required to determine the public interest and one means of obtaining information that will assist him or her to reach that conclusion is to canvass the affected neighbourhood. I see nothing wrong, unreasonable or discriminatory with seeking and obtaining the opinions of the neighbourhood. As for Scrumpy being treated differently than any other applicant for a subdivision of a property in that area, the evidence satisfies me that no applications for the subdivision of property in this area of Oak Bay have been approved since 1979. I am not persuaded that the Approving Officer acted in any manner that was discriminatory towards Scrumpy.
- [34] Scrumpy complains that the Approving Officer considered improper information and attempted to bolster his decision for rejecting the Second Application after the fact. In particular, Scrumpy is critical of the Approving Officer's interpretation and use of the District council's views that were expressed during the process of considering the First and

Second Application. Scrumpy also cites the Approving Officer's reference to the concerns expressed by local residents over the proposed redevelopment of another property as an example of the Approving Officer improperly trying to justify his decision after the fact.

- [35] In my opinion, Scrumpy's complaints are unfounded. The Approving Officer has a wide discretion when it comes to determining whether a proposed subdivision is contrary to the public interest. In the present instance, upon receiving the Second Application, the Approving Officer sought the views of the residents of the Mountjoy Property neighbourhood. He also considered the views expressed by elected officials and local residents at the various District council and committee meetings that he attended, some of which Mr. Waller also attended. I specifically find that he was entitled to consider the views of the elected members of the District's council.
- [36] Commencing in the spring of 2010, the Approving Officer was involved in the assessment of a proposed subdivision and redevelopment of a heritage property located across the street from the Mountjoy Property (the "Blair Gowie Property"). The Approving Officer attended many meetings of the District's council and various committees where the subdivision of the Blair Gowie Property was discussed. In the early part of 2011, around the same time as Scrumpy was submitting the Second Application, public opposition to the redevelopment of the Blair Gowie Property was growing and was attracting media attention. I do not find the Approving Officer's consideration of the public's view of the project in the context of considering the Second Application was improper, nor am I persuaded that the Approving Officer's reference to this information was an attempt by him to justify his decision after the fact. In my view, the present situation is not like the one in *Noort Holdings Ltd. v. Delta* (District), 26 M.P.L.R. (2d) 79 (BCSC). In *Noort*, the court found the approving officer's "post hoc explanations" found in the affidavit he filed on the judicial review should not be used in the assessment of his decision. In the case before me, the Approving Officer provided his explanations to Scrumpy prior to any litigation. I find the Approving Officer's letter of 30 June 2011 is not an case of "post hoc explanations" but simply an amplification, at the request of Scrumpy's counsel, of what he had previously advised Scrumpy.
- [37] Overall, I do not accept Scrumpy's submission that the Approving Officer did not exercise his discretion reasonably. Nor do I find that the Approving Officer was wrong or even unreasonable in his use and interpretation of the information that he had at his disposal, including the information he obtained from the various District council meetings that he attended.

Did the Approving Officer breach the rules of procedural fairness?

- [38] Scrumpy was not given access to the responses the Approving Officer received following his solicitation of views from the residents of the Mountjoy Property neighborhood in March 2011. Scrumpy made efforts to obtain this information from the Approving Officer but he refused to provide the actual correspondence he had received (i.e. emails and letters).

- [39] In my opinion, the rules of natural justice do apply to the Approving Officer's decision making process. That is, he must be able to provide a reasoned justification for his decision and when requested, the materials or a resume of the materials he relied upon to base his decision.
- [40] In my view Scrumpy was entitled to copies of the emails and letters the Approving Officer received in response to his letter of 14 March 2011, with any personal identifiers redacted from them. At the very least, they were entitled to a summary of what was contained in the materials. While the community's response to the Second Application was not the only factor the Approving Officer considered, it was a significant factor. The failure to provide the materials Scrumpy sought, or at least a summary of what was contained in them was contrary to the rules of natural justice (see: Noort, *supra*. para. 46).
- [41] Although Scrumpy did not get the material in question when it asked for it, it now has. The question that now arises is: what flows from the Approving Officer's failure to disclose the material? Scrumpy argues that its petition should be allowed and the Approving Officer's decision remitted to him to cure the procedural defect. Such a resolution would make sense if the materials had not been disclosed; but they have. In other words, I find the defect has been remedied.
- [42] The Approving Officer's breach of the rules of procedural fairness needs to be considered in the context of what the parties knew, beyond what was in the undisclosed materials. I find Mr. Waller was quite familiar with the neighbourhood's perception of Scrumpy's proposed subdivision of the Mountjoy Property. He was given a copy of the Approving Officer's letter of 14 March 2011 around the time it was sent to the residents of the neighborhood and was obviously aware that the Approving Officer was seeking the views of its residents. The evidence is clear that at the same time this was going on, Mr. Waller was canvassing the neighborhood and collecting the residents' opinions of his proposed redevelopment of the Mountjoy Property himself. He was also present at various District council and committee meetings where the Mountjoy Property was discussed. In my view, even without the materials that the Approving Officer had, Scrumpy could not have been unaware of the public's concerns and opposition to the proposed three-lot subdivision of the property.
- [43] In my opinion, had Scrumpy been given the materials in question when it asked for them, it would have been in no better a position than it was in dealing with the Approving Officer's decision. I agree with the submission of counsel for the Approving Officer in this regard when she argues that Scrumpy has failed to demonstrate how it has been prejudiced or how it would have acted differently had it had these materials.
- [44] In my view, although there was a failure to follow the rules of procedural fairness, the consequence of that failure was not so prejudicial to Scrumpy as to warrant an order sending the Approving Officer's decision back for reconsideration.

Conclusion

[45] Notwithstanding the Approving Officer's failure to follow the rules of procedural fairness, a failure that I find did not prejudice Scrumpy, his exercise of jurisdiction was reasonable and correct in the circumstances of this case.

[46] Moreover, I am not satisfied on the evidence before me, that the Approving Officer discriminated against Scrumpy or based his decision on a specious or wholly inadequate factual foundation.

[47] In light of these findings, there is no reason for this court to interfere with the Approving Officer's denial of the Second Application.

[48] Scrumpy's petition is dismissed.

"G.R.J. Gaul, J."

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